THE PORTO RICAN CASES.

ORAL ARGUMENT OF JOHN K. RICHARDS, SOLICITOR-GENERAL OF THE UNITED STATES.

IN THE SUPREME COURT, WEDNESDAY, JANUARY 9, 1901.

The Solicitor-General then addressed the court as follows:

If the court please: Before entering upon a discussion of the grave questions raised in these five cases, I desire very briefly to refer to some matters of jurisdiction. I do this, not for the purpose of securing a disposition of the cases other than upon the merits, but because counsel have adopted in these different suits, different and inconsistent methods of testing the constitutionality of revenue exactions, and the Government does not desire to be taken as acquiescing in what it considers an improper course of procedure.

Jurisdictional questions.

In the Goetze case, already argued fully before the court, the method taken of raising the question whether duties could lawfully and constitutionally be levied upon goods imported from Porto Rico after the treaty of peace and before the act of Congress, was by a protest under the customs administrative act, which was passed upon first by the collector and then by the

board of appraisers, and then came through the regular judicial channel to this court. We believe that that method was the proper one of raising the questions sought to be raised, but that method has not been pursued in these cases.

In the De Lima and the Downes cases, the goods coming from Porto Rico to New York were entered under the customs laws and the duties were paid. It is said they were paid under protest and for the purpose of securing the possession of the goods. But they were paid. Having paid the duties we submit that the importer could not bring a common-law action against the collector to recover them back. The case of *In re Fassett* (142 U. S., 479) does not apply. That was a case where Mr. Vanderbilt brought a pleasure yacht into the port of New York. He did not enter it and pay the duties upon it. He declined to do so, and when the collector seized the yacht he brought the proper action in a United States court to recover possession of the vessel. Now, if counsel desired to stand upon the proposition that no articles had been imported into the United States within the meaning of the revenue law, they should have refused to enter the goods, and then have taken the proper steps to secure possession of them. But they entered them, and they paid the duties upon them, and now they seek to bring an action against the collector to recover back the money paid, although the law required the collector to pay that money into the Treasury of the United States, and has expressly

provided that he shall not be subject to a suit of this kind.

We also make the point that in one of these cases, the Downes case, there is not involved a sufficient sum of money to give the United States court jurisdiction, our claim being that there must have been involved the sum of $2,000, when it appears in the record that only six hundred odd dollars was involved.

Mr. Justice HARLAN. Does that apply to revenue cases?

The SOLICITOR-GENERAL. This is not a revenue case, so opposing counsel insist. They don't concede it is a revenue case; they insist it is a common-law action to recover back money unlawfully exacted by an officer outside his authority and without authority.

In the Dooley cases and in the Armstrong case, suits have been brought against the Government of the United States. In the Armstrong case the suit was brought in the Court of Claims; in the Dooley cases under the concurrent jurisdiction act, in the United States circuit court. Now, if these cases are revenue cases, the suits do not lie. Suits can not be brought against the United States either in the Court of Claims or in the circuit court to recover back revenue collected by officers of the United States. That jurisdiction has not been given to those courts, nor such a privilege accorded to those who pay money into the Treasury of the United States. And the reason is obvious. If such suits lie, there is no statute of limitations, and the Government could never know the amount of claims

outstanding against it resulting from the collection of revenue through its agents. The Government has, therefore, provided exclusive methods of determining whether revenue was rightfully collected or not. When those methods are pursued, the officers of the Government are able to tell right along what claims exist against it, and Congress can provide for them. On the other hand, if these cases are not revenue cases, then they sound in tort, and neither court, as I understand, takes jurisdiction of cases of that sort. And so for these reasons, which are supported, as we think, by the authorities, we claim that the courts below had no jurisdiction of any of these cases.

Now I come to a consideration of the very serious questions raised in these cases. And in order that the court may understand how the questions arise, and the order in which I shall discuss them, I desire to state categorically the specific duties which were collected, the validity of which is contested.

The different duties collected.

In the first place, there were duties collected on goods imported into Porto Rico from the United States, during the military occupation of the island, after the signing of the protocol and before the ratification of the treaty of Paris. Such were some of the duties collected in the Armstrong case. I had supposed that similar duties were exacted in the first Dooley case, but I find I am mistaken.

In the second place, there were duties collected on goods imported into Porto Rico from the United States

during the military occupation, but after the cession of Porto Rico by the ratification of the treaty and before the passage of the Porto Rican act. Such duties were collected in the Armstrong case and in the first Dooley case.

In the third place, there were duties collected on goods imported from Porto Rico into the United States after the ratification of the treaty of Paris and before the taking effect of the Porto Rican act. Such were the duties exacted in the De Lima case.

In the fourth place, there were duties collected on goods coming into the United States from Porto Rico after the Porto Rican act took effect. The validity of these exactions is brought in question in the Downes case.

Finally, there were duties collected on goods coming into Porto Rico from the United States after the taking effect of the Porto Rican act. Such were the duties exacted in the second Dooley case.

Duties exacted in Porto Rico by the President prior to the treaty.

I shall first consider the validity of the duties exacted in Porto Rico by the President prior to the treaty.

These duties, we claim, were imposed in Porto Rico by Executive order during the military occupation of the island prior to the ratification of the treaty of peace, and were rightfully levied by the President, as Commander in Chief, acting under belligerent right, at a time when hostilities between the United States and Spain had only been suspended, not *terminated*, and

when Porto Rico had not been ceded to the United States, and when the right and obligation of conducting a civil government by the military authority was imposed upon the President. I am at a loss to perceive any reasonable grounds for opposing the validity of these exactions. It appears from the brief in the Armstrong case that the authority of the President in promulgating those executive orders and providing a civil government for the island is attacked as being an exercise of a legislative power in a time of peace, and also—they say—when Porto Rico had been ceded to the United States and had become a part of the United States. Apparently, from a reading of their brief, the position of counsel in the Armstrong case is logically this:

First. By the protocol Porto Rico was ceded to and became a part of the United States.

Second. That the suspension of hostilities which followed the signing of the protocol ended the war and brought about peace.

Third. That consequently an end was put to the authority of the President to govern Porto Rico under the war power.

What the protocol provided.

Now, these propositions seem to me so absurd that to state them is to refute them. I really feel as if I ought to beg the pardon of the court for calling attention to the provisions of the protocol. The protocol says, in the second article, "Spain *will cede* to the United States the island of Porto Rico." That is not a cession;

that is a promise to cede in the event a treaty of peace should be concluded and ratified. The protocol also provides in the sixth article, "Upon the conclusion and signing of this protocol hostilities between the two countries shall be suspended," not *terminated*. And it further provides in the fifth article, that the United States and Spain "will each appoint not more than five commissioners to treat of peace." There was no peace then. There was a suspension of hostilities and a promise to cede, and a provision that commissioners should be appointed to treat of peace; but there was no peace, and no termination of hostilities, and no cession of Porto Rico; and if the two countries had failed to conclude a treaty of peace, or that treaty had failed of ratification, the suspension of hostilities would have terminated and the war would have been resumed. So our claim is that during this entire period, until peace had been concluded, the President was in the legitimate exercise of the war power; and that brings me to another suggestion.

President's war power in Porto Rico.

Counsel talk about peace, about there being no war in Porto Rico, about the protocol placing a limitation upon the power of the President acting under belligerent right. They assume that under the war power all the President can do is to fight. It is true the President makes war in order to win a peace, and to that end he fights, as Commander in Chief, and he invades the enemy's territory and subjugates it if he can, and he holds and occupies it. After he has conquered the

enemy's territory, he stops fighting there because there is no one there to fight, but his power does not therefore cease under belligerent right. It then becomes his duty to occupy and hold this subjugated territory until disposed of by the treaty of peace, and in exercising that duty he should put in operation a government there that will cover the entire field of civil life, that will preserve order and protect life and property, and collect revenues sufficient to pay the expenses of the provisional government he thus institutes. He has a right to provide courts; he has a right to provide courts, not to pass upon purely military questions, but on all questions that arise between man and man, within the occupied territory. These propositions are so elementary it seems to me hardly necessary to refer to the authorities. I may do so later.

Necessity of modifying Spanish tariff.

Now, I desire for but a moment to refer to the necessity in this case of the President providing a new system of customs regulations in Porto Rico. At the time the war began the commerce of Porto Rico was largely with Spain and with Cuba. Necessarily, the customs regulations were framed so as to meet that condition. When the war came and we occupied Porto Rico, naturally this trade was cut off. It was an impossibility then, having proper regard for the interests of the people of Porto Rico, to continue in force, unmodified, the Spanish customs laws. The President therefore put in force new customs regulations, and he changed them

as developing circumstances showed they ought to be changed in the interests of Porto Rico and of the United States. He placed on the free list many articles brought into Porto Rico from the United States. For instance, all food supplies, implements of industry, machinery, etc., and in every way he endeavored to put in operation there a system of customs laws, enforced by the military authority, which might, if necessary, be continued in force after the conclusion and ratification of a treaty of peace, and until Congress should legislate for the island.

Authorities.

I refer in my brief to the cases of *Cross* v. *Harrison* (16 How., 164), *Leitensdorfer* v. *Webb* (20 How., 176), *The Grapeshot* (9 Wall., 129), the *Mechanics' Bank* v. *The Union Bank* (22 Wall., 276), and the *United States* v. *Rice* (4 Wheat., 246), in support of what the President did in Porto Rico with reference to customs and revenues, both before and after the treaty of Paris was made. In the case of *Cross* v. *Harrison* the customs laws and regulations for the conquered territory of California were first put in operation by the President through the military commander. It was a war tariff, and that war tariff continued to be enforced in California after the ratification of the treaty of peace which, according to the contention of opposing counsel, made California a part of the United States. The war tariff, which was not the tariff then in force under the laws of the United States in the ports of the United

States, was enforced until, I think, in August, 1848, when word was brought to California of the ratification of the treaty. Then there was substituted for that war tariff, by the order of the military commander, a tariff that was based upon and I suppose faithfully reproduced the provisions of the customs law then in force throughout the United States, and duties continued to be collected under that tariff until the arrival of agents of the Government authorized to put in force there the laws of the United States with reference to customs. But the court sustained the validity of the duties collected under all of these circumstances, even after the ratification of the treaty of peace. It held that the government which was rightfully instituted by the President under the law of belligerent right, continued in force necessarily and properly until another government should be substituted by Congress, and all the things done by the provisional government under authority of the President were sustained by the court in that case. The court said (p. 193):

Cross v. Harrison.

> The territory had been ceded as a conquest, and was to be preserved and governed as such until the sovereignty to which it had passed had legislated for it. That sovereignty was the United States, under the Constitution, by which power had been given to Congress to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States, with the power also to admit new States into this Union, with

only such limitations as are expressed in the section in which this power is given. The government, of which Colonel Mason was the executive, had its origin in the lawful exercise of a belligerent right over a conquered territory. It had been instituted during the war by the command of the President of the United States. It was the government when the territory was ceded as a conquest, and it did not cease as a matter of course or as a necessary consequence of the restoration of peace. The President might have dissolved it by withdrawing the army and navy officers who administered it, but he did not do so. Congress could have put an end to it, but that was not done. The right inference from the inactivity of both is, that it was meant to be continued until it had been legislatively changed. No presumption of a contrary intention can be made. Whatever may have been the causes of delay, it must be presumed that the delay was consistent with the true policy of the Government. And the more so as it was continued until the people of the Territory met in convention to form a State government, which was subsequently recognized by Congress under its power to admit new States into the Union.

And here is the conclusion of the case:

Our conclusion, from what has been said, is, that the civil government of California, organized as it was from a right of conquest, did not cease or become defunct in consequence of the signature of the treaty or from its ratification. We think it was continued over a ceded

conquest, without any violation of the Constitution or laws of the United States, and that until Congress legislated for it, the duties upon foreign goods imported into San Francisco were legally demanded and lawfully received by Mr. Harrison, the collector of the port, who received his appointment, according to instructions from Washington, from Governor Mason.

Duties collected in the United States on goods from Porto Rico under the Dingley Act.

In the argument so far I have briefly treated of the questions that arise from the importation into Porto Rico of goods from the United States, both before and after the treaty of peace, and before the taking effect of the Porto Rican act. Now, of course, there may be said to be involved in the collection of duties in Porto Rico on goods brought from the United States under the treaty of Paris, and before the Porto Rican act went into effect, a question similar to that which arises with regard to the exaction of duties on goods shipped into Porto Rico from the United States under the Porto Rican act. But I do not care to consider or discuss that question at this time. I prefer to take up and discuss the question which has been raised, and which in some respects is the vital question, as to the effect of the ratification of the treaty upon the relation of Porto Rico—and of course the Philippines—to the United States, because that is the primary question in these cases.

Counsel contend that upon the ratification of the treaty, and upon the cession of Porto Rico to the United

States, that territory became a part of the United States within the meaning of the general grant of taxing power to the Federal Government, subject to the limitation contained in that provision which requires "all duties, imposts, and excises to be uniform throughout the United States." In discussing the effect of the treaty, I shall not repeat the historical argument so fully and elaborately presented by the Government in the discussion of the Goetze case. I shall rather attempt, after going over the terms of the treaty, to analyze the pertinent provisions of the Constitution of the United States, with a view of determining what was the real meaning intended by the framers of the Constitution to be given to the words "the United States" used in that connection.

Our opponents' contention stated logically.

Reduced to a legal proposition, the denial of the power which has been exercised and is being exercised by the President and by Congress in the new possessions, amounts to this: Ceded territory becomes, *by the act of cession*, an integral part of the United States, to which the Constitution of its own force at once applies, placing its people, its products, and its ports on an immediate equality with ours, and conferring upon them all the rights, privileges, and immunities enjoyed under the Constitution by the people, the products, and the ports of the several States. Moreover, the limitations of the Constitution apply there as here, requiring the same taxes, duties, imposts, and excises to be collected, and the same Anglo-Saxon system of trial by

jury to be used. Their people become at once our people, citizens of the United States, our ports become their ports, and our markets their markets. They are free to come here or to sell their products here, while our taxes and our laws, however unsuitable, must go there.

There is nothing obscure about this doctrine. It is plain and unmistakable. The act of cession is all powerful; its effect immutable. As soon as the title passes, the territory is incorporated within the United States, and the Constitution *ex proprio vigore* does the rest. The proposition is true as stated, or not true at all. Either the mere act of cession, irrespective of the terms of the treaty (which I shall consider later) and regardless of the action of Congress, makes acquired territory a part of the United States in the constitutional sense, or it does not. If it does, the treaty-making power, in acquiring territory, so far as the status of that territory is concerned, is necessarily limited to providing for the mere act of cession. It can make no terms. It can not take temporarily or provisionally, or for this purpose or that. It can give no pledges; it can grant no privileges; it can reserve no questions for future disposition; in short, although called the treaty-making power, and granted without limitation, it is stripped of its proper functions; it can not treat; it is lame, impotent, impossible, ridiculous.

On the other hand, if the territory does not, by the mere act of cession, become immediately an integral part of the United States in the constitutional sense, of

necessity the provisions of the treaty and the action of Congress must determine whether it shall or shall not become or be deemed a part of the United States, and, if ever, when. In other words, the acquired territory becomes not a part but a possession of the United States—territory, to use the language of the Constitution, belonging to the United States—and its disposition and government rest, under the Constitution, with the treaty-making power and with Congress.

Mr. Justice BROWN. If it be territory belonging to the United States, then does it fall within the provisions of the Dingley act, which requires duties to be assessed upon goods from foreign countries, or does it not cease to be a foreign country?

The SOLICITOR-GENERAL. I think not; not within the meaning of the customs law. The Dingley law treated as foreign all territory outside of the limits of the United States, meaning the States and Territories then treated for customs purposes as the United States, and that condition remained until Congress saw fit to change it.

Territory may be taken and held sub modo.

In the noted case of *Fleming* v. *Page* (9 How., 614) Mr. Justice Taney says that "the United States may demand the cession of territory as the condition of peace, in order to indemnify its citizens for the injuries they have suffered or to reimburse the Government for the expenses of the war." And in this connection I might also refer to the language of Chief Justice Marshall in the famous *Canter Case* (1 Peters, 541), in which he says that acquired territory "becomes a part of the

nation to which it is annexed either on the terms stipulated in the treaty of cession, or on such as the new master shall impose." And in the case of *Cross* v. *Harrison* (16 How., 164) Mr. Justice Wayne uses this language (p. 197): "By the ratification of the treaty California became a part of the United States."—So it did, in the international sense—in the legislative sense—subject to the dominion of the United States, to be ruled and regulated by Congress, under the power granted to make all needful rules and regulations respecting the Territory belonging to the United States.—And he continues: "*And as there is nothing differently stipulated in the treaty with respect to commerce*, it became instantly bound and privileged by the laws Congress had passed to raise a revenue from duties on imports and tonnage."

Mr. Justice BROWN. That case did not involve the question involved here of an importation from California to New York.

The SOLICITOR-GENERAL. That is true.

Mr. Justice BROWN. It involved quite a different question. That involved a case of importation from an admittedly foreign country into the United States.

The SOLICITOR-GENERAL. Yes, although the court did say, if I remember correctly, that if these goods had been allowed by the military authorities to enter California free of duty, then duty would have been exacted on them in the ports of the United States if taken there. Here is what the court says on page 192: "The best test of the correctness of what has just

been said is this: That if such goods had been landed there duty free, they could not have been shipped to any other port in the United States without being liable to pay duty." Of course, California was contiguous territory, and it was very much better, as a matter of policy, to bring it as soon as possible within the operation of the customs laws of the United States, and that was what was done. But that does not apply to Porto Rico or the Philippines.

Now if territory may be acquired for the purposes, or any of the purposes, mentioned by Chief Justice Taney, it certainly may be taken and held upon such conditions as may be proper and necessary to carry the purpose into effect. Territory acquired to indemnify and reimburse may be taken and held as a pledge, or as a possession, provisionally, temporarily, or indefinitely, with the reserved power of disposition and control suitable to accomplish the desired end. To incorporate such territory into the Union and make it a part of the United States would defeat the very object of the acquisition. Once there it would have to stay, for no power exists within the Union to dismember it.

If Chief Justice Taney was wrong, and we can not take territory *sub modo* to indemnify or reimburse us, but only to make it a part of the United States, then, before the President carries a war into the enemy's country, he should send ahead his advance agents—a commission to ascertain and report whether

the territory he proposes to invade and subjugate is fit to be made a part of the United States. For observe, neither the treaty-making power nor Congress can, according to the contention of the other side, prevent that result if a cession follows conquest. Before the President sent Dewey to Manila he should have satisfied himself that the Philippines were suitable for incorporation into the Union, for we could destroy the Spanish power there only at the risk of having to assume the burdens of sovereignty ourselves.

The Treaty of Paris.

The Constitution, while vesting in the President and Senate the treaty-making power, provides that: "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land." The treaty of Paris was made under the authority of the United States, and contains the terms upon which we acquired these Territories. It is unique in this, that while former treaties of cession all provided that the civilized inhabitants of the ceded territories should ultimately—not immediately, but *ultimately*—become citizens of the United States, and be incorporated in the United States, this treaty left the determination of their civil rights and political status to Congress.

Mr. Justice HARLAN. State that proposition again.

The SOLICITOR-GENERAL. I say that the treaty of

Paris is unique in this, that while former treaties, such as the Florida treaty, the Louisiana treaty, and others, provided that the civilized inhabitants of the ceded territories should ultimately—not immediately, but ultimately, in the course of time—become citizens of the United States, this treaty, the treaty of Paris, left the determination of their civil rights and political status to Congress.

Mr. Justice HARLAN. What treaty has used the word "civilized"?

The SOLICITOR-GENERAL. I do not assume to quote the precise language of the particular treaties, but simply state the effect of them.

Mr. Justice SHIRAS. The treaty with Russia used that term.

The SOLICITOR-GENERAL. Yes, the Alaskan treaty does use it. It distinguishes the uncivilized tribes there.

Let me refer to some of the provisions of the treaty of Paris. Spain ceded to the United States the island of Porto Rico, the island of Guam, and the archipelago known as the Philippine Islands. Spanish subjects, natives of the Peninsula, residing in such territories, were given one year from the exchange of the ratifications—that is, until April 11, 1900—to preserve their allegiance to Spain by making a declaration in a court of record. In default of this they were to be held to have renounced it and to have adopted the nationality of the territory in which they may reside—not to have adopted the nationality of the United States, to which the treaty ceded the islands, but to have adopted the

nationality of the territory in which they may reside. Then directly after that comes this provision:

> The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress.

Spaniards residing in the territories were to be subject, under Article XI, to the jurisdiction of the courts of the country—not the courts of the United States—pursuant to the ordinary laws governing the same—presumably the Spanish or civil law, and were to have the right to appear and pursue the same course therein "as citizens of the country to which the courts belong"—not as citizens of the United States. Article IV reads as follows:

> The United States will, for the term of ten years from the date of the exchange of the ratifications of the present treaty, admit Spanish ships and merchandise to the ports of the Philippine Islands on the same terms as ships and merchandise of the United States.

With regard to this, it is obvious that, unless a separate system of customs regulations is adopted for the Philippines, which applies to goods shipped into the Philippines from the United States, then the treaty, if observed, throws open the ports of the Philippines absolutely to Spanish ships and Spanish importations, and provides an open door into the Philippines, and thence into this country, for whatever goods Spain sees fit to send there. I do not intend to pursue an argument of policy based upon this provision, but simply

call attention to the fact that the treaty itself negatives the view that these islands were to become a part of the United States within the meaning of our customs laws.

Again, for ten years Spanish scientific, literary, and artistic works were to be admitted free of duty into all the ceded territories, and that provision, as counsel has stated, has been incorporated into the Porto Rican act, for the purpose of carrying out the pledge of the treaty. In short, neither of these provisions can be carried out if the Constitution requires our customs regulations to apply in those islands as here in the United States.

Status of the ceded islands under the Treaty.

The purpose of these provisions is plain. Although under the power and protection of the United States, the territories are to have their own laws, their own courts, their own ports, their own commerce, their own citizenship, their own system of revenue. A separate and distinct existence under, but without, the United States, in the purely constitutional sense, as used in the general grant of taxing power, is contemplated. The parties to the treaty both knew that the location and condition of these islands would not permit their incorporation into the United States and the application to them of those laws of commerce, of revenue, and of civil and criminal procedure which the Constitution, according to the contention of opposing counsel, requires to be uniform throughout the United States.

They provided, therefore, for a system of government which should be adapted to local conditions and needs.

Now, are we free to disregard the plain provisions of the treaty, which the Constitution says shall be the supreme law of the land? If so, what becomes of the consent of the treaty-making power to the acquisition? Would the President and the Senate have consented to take the territories upon any other terms? Would Spain have consented to cede them? Certainly the treaty never intended to make these tropical islands, with their savage and half-civilized and civilized people a part of the United States in the constitutional sense, and just as certainly did make them a part of the United States in the international sense.

Mr. Justice HARLAN. What do you mean by the international sense?

The SOLICITOR-GENERAL. I am just going to explain. The term "the United States" may mean the territory which governs, or the territory over which the Government extends. The former is the constitutional, the latter the international, or, it may be, the legislative sense. In the latter sense, in the international or legislative sense, States and Territories, all places subject to the jurisdiction of the national power, combine to constitute what Chief Justice Marshall in *Loughborough* v. *Blake* (5 Wheaton, 319) termed "The American Empire," "Our Great Republic." "Does this term," said he, referring to "the United States," "designate the whole or any particular portion of the American empire? It is the name given to our great republic,

which is composed of States and Territories." The great Chief Justice was clearly correct in holding that the taxing power extends throughout the United States in the international or legislative sense, although the limitation of the Constitution on the taxing power for Federal purposes applies, as we contend, only throughout the United States in the constitutional sense. What we are concerned with is, of course, the constitutional sense. For the vital question is whether the constitutional limitation upon the Federal taxing power which applies "throughout the United States" operates in the new territories. As stated in the preamble——

Mr. Justice PECKHAM. Do you find any case where any such distinction has been drawn as you make now—between the United States in the constitutional sense and the United States in the international sense?

The SOLICITOR-GENERAL. I think I could if it were desirable. I am going on to show what these words "the United States" mean in the constitutional sense. I think it perfectly apparent that the phrase "the United States" in the international sense comprehends all territory which is subject to our dominion.

Mr. Justice PECKHAM. Yes; I understand what you state, but my question was whether you have in mind, or had come across in your research, any case in which such a distinction was drawn, between the United States in the constitutional sense and the United States in the international sense.

The SOLICITOR-GENERAL. The distinction has been

clearly drawn in a decision of this court between the word "State" as used in the Constitution and the word "State" as used in a treaty, in the international sense. Thus, it was held in *Geoffrey* v. *Riggs* (133 U. S., 258) that the District of Columbia is a "State" in the international sense, but certainly it is not a State within the meaning of the Constitution. That has been expressly held in *Hepburn* v. *Ellzey* (2 Cranch, 445).

The Constitution.

As stated in its preamble, the Constitution of the United States was ordained and established by "the people of the United States" "for the United States of America." There is no ambiguity about the meaning of the words "United States of America," as here used. They mean the States united under the Constitution, and are named individually in the second section of the first article, relating to the apportionment of representatives among the then existing United States.

Mr. JUSTICE HARLAN. The existing United States—those constituting the existing United States?

The SOLICITOR-GENERAL. No, I did not say that. I said that the United States which framed and adopted the Constitution are named specifically in the Constitution at the place stated. They were the thirteen colonies which had first become the United States in the Declaration and under the Confederation, and which, through their people, framed the present Constitution, in order, among other things, "to form a more perfect Union." There never was any doubt in those days as to what that term meant. This conclusively

appears from the sixth article, which provides that all debts contracted before the adoption of the Constitution "shall be as valid against the United States under the Constitution as under the Confederation."

Mr. Justice HARLAN. And that would include the States, of course, which afterwards came into the Union before the debts were paid?

The SOLICITOR-GENERAL. You could hardly say that they were "under the Confederation." They were not "United States under the Confederation." Undoubtedly the debts would be valid against the United States, including the States which were subsequently admitted.

Mr. Justice WHITE. Do you make a distinction in your mind or is there any distinction, from the consideration which you have given to this case, between the States and the Territories of the United States, and the States and *the territory* of the United States? Does not "the territories" in these cases which you have quoted from refer to territories in which Congress has organized a government, thus making them impliedly a part of the United States? Does not the article of the Constitution giving power to dispose of the "territory" suggest a distinction between the Territories which have been organized, and "territory" belonging to the United States as such?

The SOLICITOR-GENERAL. Does your honor mean to ask me whether territories subsequently acquired came within the power thus granted to Congress to make all needful rules and regulations for the government of the territory of the United States, or is it confined

simply to the territory which existed at the time of the adoption of the Constitution, outside of the thirteen States?

Mr. Justice WHITE. You quoted the language of Chief Justice Marshal in *Loughborough* v. *Blake*, and then you speak of the United States in the constitutional and the international sense of the words "United States." But that language of Chief Justice Marshall, in which he spoke of "Our Great Republic," "The American Empire," was used with reference to the exercise of the taxing power——

The SOLICITOR-GENERAL. I know it was. He was correct, as I take it, in his conclusion that the taxing power of the United States extends over all the territory belonging to the United States; that it extends over all the States and Territories if Congress sees fit to exercise it. But I think what he says—which is the basis of the claim that the limitation that duties, excises, and imposts shall be uniform throughout the United States, applies to the Territories as well as the States—was not requisite to the decision of the case before him, and I am endeavoring to argue was incorrect.

Mr. Justice WHITE. That is my question. My question was to ascertain whether you were challenging the statement of Chief Justice Marshall in that case or whether you were concurring in it.

The SOLICITOR-GENERAL. I have to challenge it.

Mr. Justice BROWN. The general expression, you mean?

The SOLICITOR-GENERAL. I say looked at from the

point of view of the decision he was correct, because in a geographical sense "the United States," throughout which Congress may exercise the taxing power for Federal purposes, includes necessarily all territory subject to the dominion of the United States. Now, that is the international or legislative sense. But I submit the constitutional sense covers only the States, and was so intended by the framers of the Constitution.

The people of the States the source of power.

The primary source of the sovereign power was the people of the thirteen original States. These men believed they were forming a government which would endure for ages, and would dominate a continent, and probably territory outside—islands beyond the seas. In the treaty of alliance which Benjamin Franklin concluded with France, in 1778, there was this provision in the fifth section:

> If the United States should think fit to attempt the reduction of the British power remaining in the northern parts of America, or the islands of Bermudas, those countries or islands in case of success, shall be confederated with, or dependent upon the said United States.

So from that we can see how far-reaching was the vision of the stalwart men of the early days. Now, notwithstanding this expansive outlook, it does not appear that the fathers of the Constitution worried themselves about "the consent of the governed" outside of the States they lived in, which alone were to participate in political power. They formed a government

in which the people of the States were alone represented and adopted a constitution which, in its distribution and limitation of powers, applied almost wholly to the States, united or several.

In the early case of *Hepburn* v. *Ellzey* (2 Cranch, 445) the question came before the Supreme Court whether a citizen of the District of Columbia could maintain an action against a citizen of Virginia. In support of the jurisdiction Mr. Lee insisted that to give the term "State" a limited construction would deprive the citizens of the District of the general rights of citizens of the United States and put them in a worse condition than aliens; and he put the pertinent question whether, in the face of the provision that "no tax or duty shall be laid on any articles imported from any State," Congress could lay a tax or duty on articles exported from the District of Columbia. But the court properly held that a citizen of the District is not a citizen of a State and can not use the United States courts as such, Chief Justice Marshall saying: "The members of the American confederacy only are the States contemplated in the Constitution."

(Thereupon, at 4.30 o'clock p. m., the court adjourned until 12 m. to-morrow, January 10, 1901.)

THURSDAY, *January 10, 1901.*

ARGUMENT OF THE SOLICITOR-GENERAL—Continued.

Distinction between "the Territory" and "the Territories."

The SOLICITOR-GENERAL. May it please the court: Shortly before the close of the session of yesterday, in connection with a quotation which I made from the case of *Loughborough* v. *Blake*, Mr. Justice White put to me a question in which he desired my opinion as to whether I recognized any difference between the words "the Territories" as used by Chief Justice Marshall and "the territory" which the Constitution places under the disposition of Congress. I did not hear the question distinctly nor comprehend the full purport of it. I do not recognize that the power of Congress over territory belonging to the United States ceases when such territory is organized and brought under the operation of the laws of the United States; but I do recognize a distinction between unorganized territory and the territories to which Chief Justice Marshall may possibly have referred. If I gave the court the impression that I intended to say that, in using those words, Chief Justice Marshall referred to the States and Territories, meaning thereby to cover all territory under the dominion of the United States, which I had defined, whether correctly or incorrectly, as the international meaning, I think I was wrong. I am inclined to think that what Chief Justice Marshall had in mind was "the United States" in the legislative sense, meaning thereby the States of the Union, the District of

Columbia, and the organized Territories, to which Congress had applied the revenue laws of the United States, thus including all that territory within the phrase "the United States," as designating the territory to which Congress had applied the revenue laws of the United States. So, really, there are four meanings which may be conveyed by the phrase "the United States."

Meanings of the phrase, "The United States."

In the first place, it may mean the sovereignty itself, what Chief Justice Marshall called "that grand corporation."

In the second place, it may mean, geographically, what Chief Justice Marshall calls "the American Confederacy," composed of the members of the Union, the States inhabited by the people who participate in the Government of the United States; and this is what I have termed the constitutional sense.

In the third place, in a geographical and legislative sense, it may mean the States and the District of Columbia and the Territories, which Congress has seen fit to treat as the United States for legislative purposes; over which Congress has extended, and to which it has applied, the laws of the United States which are applicable.

And in the fourth place, it may mean something broader, which is the international sense, as I take it; that is, all territory, wherever situated, under the dominion of the United States, whether organized or not, and whether ever brought within the operation of

the specific laws of the United States. And our claim is that newly acquired territory does not become a part of the United States in the legislative sense until Congress shall so determine.

When we closed I was reading from the decision of Chief Justice Marshall in the case of *Hepburn* v. *Ellzey* (2 Cranch, 452), in which he defined the "American Confederacy," saying:

> The members of the American Confederacy only are the States contemplated in the Constitution. The House of Representatives is to be composed of members chosen by the people of the several States; and each State shall have at least one Representative. The Senate of the United States shall be composed of two Senators *from* each State. Each State shall appoint, for the election of the Executive, a number of electors equal to the whole number of Senators and Representatives. These clauses show that the word "State" is used in the Constitution as designating a member of the Union.

The States alone are the members of the American Confederacy. They constitute the Union, and the Union and the United States are equivalent terms in the Constitution. Thus the Constitution and "the laws of the United States" are made the supreme law of the land; yet Congress is to provide for calling forth the militia to execute "the laws of the Union." All legislative powers granted are vested in the Congress "of the United States," but the President is required from time to time to give to the Congress information of the state "of the Union."

In the first article, defining the legislative powers, it is provided that Representatives and direct taxes shall be apportioned "among the several States which may be included within this Union." This does not include the Territories, but does operate, evidently, throughout the United States.

Duties, imposts, and excises shall be uniform "throughout the United States." This, as we claim, is a geographical limitation, requiring indirect taxes to operate generally throughout the United States—that is, among the several States composing the Union. The history of the adoption of this provision will be found in interesting form in the learned opinion of Mr. Justice White in the case of *Knowlton* v. *Moore* (178 U. S., 41), sustaining the constitutionality of the Federal tax on legacies. In the original draft the provision prohibiting any preference to the ports of one State over those of another, and that conferring and limiting the taxing power, were placed together. They really mean the same thing, that the States of the Union shall be treated alike in the regulation of commerce and the imposition of taxes. The uniformity required in each case was a uniformity among the several States of the Union, and this is shown by the decision in the *Cherokee Tobacco case* (11 Wallace, 616), affirming the constitutionality of the act of 1868 extending the excise tax on liquors and tobacco alone to the Indian Territory. A minority of the court held that, in view of the treaty provisions, it was not the intention of Congress to extend even the tax on liquor

and tobacco to the Indian Territory. Obviously, the court was unanimous in the opinion that, although the Indian Territory was within the exterior boundaries of the United States, the provision of the Constitution requiring excises to be uniform throughout the United States did not apply within the Indian Territory.

The Constitution gives Congress power to regulate commerce "among the several States," and to establish a uniform rule of naturalization and uniform laws on the subject of bankruptcy "throughout the United States." Now, we submit that this latter was to remedy the mischief resulting from the diverse and conflicting legislation of the several States upon these subjects by securing uniform provisions throughout the States of the Union. I refer to No. 41 of the Federalist, written by Mr. Madison, upon that point, in which he says such was the object of that provision. The early laws of this character applied only within the States. The recent acts have properly been extended to the Territories, which Congress in its discretion has seen fit to include within the limits of the United States, legislatively treated.

It is provided that "no tax or duty shall be laid on articles exported from any State;" but nothing is said about any Territory. And that "no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another; nor shall vessels bound to or from one State be obliged to enter, clear, or pay duties in another;" but nothing is said about the ports of any Territory.

The prohibitions of the tenth section of the first article apply only to the States. "No State shall pass any bill of attainder, or ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility. No State shall, without the consent of Congress, lay any imposts or duties on imports or exports," etc. All these limitations apply only to the States of the Union.

In the second article, which grants and defines the Executive power, it is provided that Congress may determine the date on which the electors shall give their votes, which day shall be the same "throughout the United States." Necessarily, the United States here means the States of the Union which alone take part in electing the President. Later, it is provided, that during his term of office the President shall not receive, in addition to his stated compensation, any other emolument from "the United States or any of them," showing that the States united were alone in mind.

Mr. Justice BREWER. Do you think in that connection that the various Territories can add to the President's salary; in view of that, can the various Territories add to the emoluments of the President?

The SOLICITOR-GENERAL. No, I think the spirit of this would prevent that. I think there is no direct application to the Territories, but I dare say the spirit of it would forbid what you suggest. Territorial action might, in a certain sense, be treated as the action of the United States, seeing that a Territory could not act outside of the authority of the United States, being

under the complete control of Congress. It might, in a certain sense, be treated as the action of the United States, if a Territory attempted to do that. However, I prefer to say that the general spirit of this provision applies, and would prevent what is suggested by your honor.

The third article applies to the judicial power of the United States. It has been repeatedly held that the Territorial courts are not organized under this article, and are, therefore, not courts of the United States. The article constantly keeps in mind the relation of the United States to the several States, and of those States and their citizens to one another. No mention is made of the Territories or their citizens.

The fourth article guards the rights of each State and its citizens with respect to every other State. The public acts of each shall have full faith and credit in all others. The citizens of each shall be entitled to the privileges and immunities of the citizens in the several States. Fugitives from justice shall be surrendered; new States may be admitted into "this Union;" and a republican form of government to every State in the Union is guaranteed. But there is no safeguard or guarantee whatever in the case of a Territory and its citizens. No republican form of government for the Territories is guaranteed. On the contrary, just preceding the guarantee to the States, and following the provision for the admission of new States, the following grant of plenary power is made:

Congress shall have power to dispose of and

> make all needful rules and regulations respecting the territory or other property belonging to the United States.

Notice the phraseology. Territory is treated as property, as something distinct from the United States—something belonging to the United States, a subject to be ruled and disposed of by Congress in its discretion as conditions may require, without being hampered by the restrictions which were framed for the States.

Mr. Justice BREWER. Right there, do you understand that Congress has absolute power over territory acquired, to do as it pleases with it?

The SOLICITOR-GENERAL. No; I deny that utterly, as I shall show to your honor.

Mr. Justice BREWER. What limitations?

The SOLICITOR-GENERAL. I shall point out specifically the limitations later. I say that Congress is subject to all applicable limitations, and I shall point out later what I mean by applicable limitations, in view of the decisions of this court.

In the case of *McCulloch* v. *Maryland* (4 Wheaton, 442), in which the supremacy of the United States within the sphere of its action was sustained, Chief Justice Marshall, emphasizing the authority conferred on Congress to select the means for carrying into execution the powers vested by the Constitution, said:

> The power to make all needful rules and regulations respecting the territory or other property belonging to the United States is not more comprehensive than the power to make all laws which shall be necessary and proper for carry-

ing into execution the powers of the Government.

Apparently, he took the territorial grant as the test and standard of plenary power, as the maximum of comprehensiveness.

The thirteenth amendment contains an explicit recognition of the fact that a place subject to the jurisdiction of the United States is not necessarily a part of the United States, for it provides:

> Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

The Slave Trade Acts.

In this connection, in addition to the many instances cited by the Attorney-General where Congress has drawn a distinction between the United States and the Territories, let me refer to the act of March 2, 1807 (2 Stat., 426), prohibiting the importation of slaves into this country. That act provided that it should be unlawful for any person to import or bring from any foreign country any slaves—now, I am quoting—"into the United States or the Territories thereof." And in the subsequent act of 1818 (3 Stat., 450), which supplemented this act, the same phraseology was used, the first section providing that it should be unlawful to import any negroes "into the United States or Territories thereof."

And as illustrating the fact that this court has drawn a distinction between the rights before this court of Territories and Territorial legislation, as distinguished from States and State legislation, I wish to refer the court to the case of *Miner's Bank* v. *Iowa* (12 Howard, 1), in which the court held that the validity of a territorial act repealing the charter of a bank granted by a Territory, could not be brought before the Supreme Court, under the twenty-fifth section of the judiciary act, either on the ground that there was drawn in question the validity of a statute of, or an authority exercised under, any State, or on the ground that there was drawn in question the validity of a statute or authority exercised under the authority of the United States. In holding that there was not drawn in question the validity of an act passed by a State, Mr. Justice Daniel, speaking for the court, said (p. 7):

> In order to give this court jurisdiction, the statute, the validity of which is drawn in question, must be passed by a *State* a member of the Union, and a public body owing obedience and conformity to its Constitution and laws. That if public bodies, not duly admitted into the Union, undertake as States, to pass laws which might encroach on the Union or its granted powers, such conduct would have to be reached either by the power of the Government to put down insurrection or by the ordinary penal laws of the States and Territories within which these bodies are situated and acting; but their measures are not examinable by this court upon

a writ of error. They are not *States*, and can not pass statutes within the meaning of the judiciary acts.

Other cases cited by the court, in the opinion just quoted [referring to the case of *Scott* v. *Jones*, in the 5th Howard], might be adduced to show the difference ever taken by the court in reference to its relation to the States as States, and as contradistinguished from the Territories of the United States. It seems to us, that the control of these Territorial governments properly appertains to that branch of the Government which creates and can change or modify them to meet its views of public policy, viz, the Congress of the United States. That control certainly has not been vested in this court, either in mode or substance, by the twenty-fifth section of the judiciary act.

In holding that the Territorial charter could not be regarded as an act of Congress, the court said:

> The charter of the Bank of Dubuque enacted in all its details and powers ever possessed by it (and according to which it was in fact organized) by the legislature of Wisconsin, must be looked upon as the creature of that legislature. To regard it as we are urged to do by the argument of the plaintiff in error, would constitute it rather a bank of the United States, situated *without* the United States, and operating within the Territory of Wisconsin.

And I think in the opinion the court will find the word "without" italicized—"*without* the United States."

Plenary power of Congress over the Territories.

I believe that a careful examination of the Constitution leads but to one conclusion, that the power of Congress over the Territories is plenary and absolute. Whether it follows from the power to acquire and hold territory, or is conferred by the clause of the Constitution which declares that "Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States," it is full and complete, and is unhampered by those limitations and restrictions which were intended to apply only within the States of the Union.

The Canter Case.

There is a line of decisions of the Supreme Court running back to the early days which sustains this view. Some years after the decision in *Loughborough* v. *Blake*, the case of *Insurance Company* v. *Canter* (1 Peters, 511) came before the Supreme Court, over which Chief Justice Marshall still presided. A court of the Territory of Florida, composed of a notary and five jurors, had sold a wrecked cargo of cotton on a salvage claim and transferred the title to Canter, the purchaser. It was insisted that upon the acquisition of Florida it became a part of the United States over which the Constitution extended, and that under the Constitution admiralty jurisdiction could be exercised only by the courts of the United States. It had to be conceded that the Territorial court was not organized

in accordance with the Constitution, which requires judges to be appointed for service during good behavior. The opinion of Chief Justice Marshall is worthy of careful study. Its logic is unanswerable. While the power of Congress to govern ceded territory was declared to be inevitable and absolute, the limitations of the Constitution upon the exercise of the judicial power of the United States was expressly held to be confined to the States, the Chief Justice saying (p. 545):

> Although admiralty jurisdiction can be exercised in the States in those courts, only, which are established in pursuance of the third article of the Constitution, the same restriction does not extend to the Territories. In legislating for them, Congress exercises the combined powers of the General and of a State Government.

Expressions of the Court.

The doctrine thus enunciated by the great Chief Justice has been approved and followed by his successors in a long line of cases, I think all of which were cited by the Attorney-General. Note the language used. Chief Justice Waite speaks of the Territories as "the outlying dominion of the United States" (101 U. S., 129, 133)—an apt phrase. "The outlying dominion!" Lying outside of what? Outside of the governing body—the United States. The "outlying dominion of the United States," not a part of the United States. He says that Congress "may do for the Territories what the people, under the Constitution of the United States, may do for the States,"

the fullest and clearest expression of Constitutional power without limitation (*id.*).

Judge HARLAN. Please read that again.

The SOLICITOR-GENERAL. That Congress "may do for the Territories what the people, under the Constitution of the United States, may do for the States." Can there be any fuller expression of plenary power than that. Mr. Justice Matthews says that "the people of the United States, as sovereign owners of the National Territories, have supreme power over them and their inhabitants." "It rests with Congress to say whether, in a given case, any of the people, resident of the Territory, shall participate in the election of its officers, or the making of its laws." (114 U. S., 15, 44.) In other words, Congress can at any time repeal an act giving local government to a Territory, and take the authority to itself. Mr. Justice Bradley says that "It would be absurd to hold that the United States has power to acquire territory and no power to govern it when acquired." (136 U. S., 1, 42.) And Mr. Justice Harlan says that "The whole subject of the organization of the Territorial courts, etc., was left by the Constitution with Congress, under this plenary power over the Territories of the United States." (141 U. S., 174, 188.) And then he inquires, "Has Congress, under 'the general right of sovereignty' existing in the Government of the United States as to all matters submitted to its exclusive control, including the making of needful rules and regulations respecting the Territories of the United States, any

less power over the judges of the Territories than a State, if unrestrained by its own organic law, might exercise over the judges of its own creation?" (141 U. S., 174, 190.) And Mr. Justice Gray says that, "By the Constitution, as is now well settled, the United States, having rightfully acquired the Territories, and being the only Government which can impose laws upon them, has the entire dominion and sovereignty, national and municipal, Federal and State, over all the Territories, so long as they remain in a Territorial condition."

Applicable limitations in governing Territory.

And now I come to the subject of limitations. Are there no limitations on this plenary power of Congress to govern the Territories? I believe there are. If there are any who believe that the President or Congress can govern the new possessions outside of the Constitution, and wholly irrespective of all its limitations, I am not of them. Neither the executive, nor the legislative, nor the judicial branches of the Federal Government can act except through a power conferred by the Constitution. Wherever a particular power is exercised the limitation placed upon it by the Constitution must be observed. The Constitution was formed by the people of the thirteen original States. They provided the Government, conferred upon it certain powers, and subjected it in the exercise of some of these powers to certain limitations. It expressly prohibited the exercise of certain powers under any circumstances, and wholly irrespective of the place

where exercised. Moreover, since certain powers were reserved to the States composing the Union, certain limitations and prohibitions were laid upon the States. In any case involving the exercise of a power claimed under the Constitution, the first question is, Was the power granted? and the next is, What are the limitations?

The Constitution and the Flag.

The difficulty of a clear conception of the important question in these cases has been increased by the use of campaign catchwords, of political phrases. "The Constitution follows the flag" is one of these. It is made use of to induce people to believe that the Government is contending that the President and Congress, in dealing with the new possessions, avowedly act outside of the Constitution; that the Government claims that the Constitution stays here, within the United States, leaving the President and Congress power unlimited and despotic with respect to the new possessions. This claim is designed and calculated to put both the President and Congress in a position obnoxious to a liberty-loving people. The position is one they have never taken and do not now occupy. Both the President and Congress concede, as I understand it, that they have no power except under the Constitution, and that they are subject in the exercise of their powers to every limitation properly applicable. The Constitution and the flag go together. Wherever the flag flies as the symbol of the sovereignty of this country it is raised by an authority created and existing under the Constitution.

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The flag now floats in the Philippines by virtue of the war and treaty-making power through which we have acquired that territory. It was raised in Porto Rico under the same authority. It waves there now as the symbol of the sovereignty of the Republic over rightfully acquired territory, which the Constitution expressly intrusts the regulation and disposition of to Congress. The Constitution is in force in the Philippines and is in force in Porto Rico, but not all of its provisions. Only those provisions operate there, or operate on Congress in legislating for the new possessions, which the framers of the Constitution intended should apply. Opposing counsel speak of the Constitution as if all of its provisions apply everywhere throughout the scope of the authority of the government it creates. This is not true. The United States, in the broadest sense, is composed of States and Territories, organized and unorganized. There are certain prohibitions and limitations which clearly apply only to the States as bodies politic. They were not intended to and do not apply to the Federal Government at all. There are other limitations which apply to the General Government when acting within the States united under the Constitution. There are other limitations which apply both throughout the States and the Territories, organized and unorganized. There are other limitations which apply everywhere, both within and without the United States in the broadest sense. So, after all, it is a question of the scope and application of specific limitations. Because an inapplicable limitation is not

in force in the new possessions, it does not follow that applicable prohibitions and limitations can or would be ignored.

To repeat, the United States of America—which Chief Justice Marshall, in *Dixon* v. *The United States*, said is "the true name of that grand corporation which the American people have formed, and the charter will, I trust, long remain in full force and vigor"—is a body politic, of which the States alone are integral constituent parts, they only, as the same Chief Justice said in *Hepburn* v. *Ellzey*, being "the members of the American Confederacy," and this governing entity exercises sovereignty over "the American Empire," "our Great Republic," which is composed of States and Territories—and, in the broadest sense, if he does not mean by this, territory unorganized, then over that too. The Territories are not integral parts but possessions of this "grand corporation." The governing unit, composed of the States, possesses and exercises dominion over the Territories, subject only to the applicable restrictions and limitations of the Constitution. All the provisions of the Constitution do not and can not have uniform operation both within the States and Territories whose political status and relation to the governing body are so widely different. It is true that every part of the national domain is within the jurisdiction of the Constitution, but it does not follow that every part is subject to all of its provisions. Each part is subject to some one or more of them, but all parts are not subject to all of them.

The Territories, not being parts, but possessions, of the governing body, are not within the scope or purpose of those limitations and restrictions which were designed to preserve and protect the rights of the States composing the Union. In legislating for the Territories Congress is not limited to jealously guarded national powers, but exercises the combined powers of the General and of a State Government.

Mr. Justice HARLAN. Where is the Dixon Case you referred to?

The SOLICITOR-GENERAL. In 1 Brockenbrough, 177. It was a case decided on the circuit.

The safeguard when Congress thus acts outside of those limitations to which I am going now to refer, and which I regard as applicable, is what Chief Justice Marshall refers to in *Gibbons* v. *Ogden* (9 Wheaton, 1), where, meeting the objection that, according to the position taken by counsel for the Government, despotic power was given by the clause authorizing Congress to regulate commerce among the several States, he said (p. 197):

> The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections are, in this, as in many other instances—as that, for example, of declaring war—the sole restraints on which they have relied to secure them from its abuse. They are the restraints on which the people must often rely solely in all representative governments.

The applicable limitations stated.

But there are limitations which apply to Congress in exercising the territorial grant. Obviously those limitations which are laid upon the exercise by Congress of a special power, irrespective of the place where exercised, do apply, such as those forbidding Congress to pass any bill of attainder, or any ex post facto law, or confer any title of nobility. These, as Madison said in No. 43 of the Federalist, are contrary to the first principles of the social compact. The prohibition of slavery operates by express provision everywhere. But these are not the only limitations. It is always to be borne in mind that this is a Government framed by the people, among other things, to establish justice and to secure the blessings of liberty. A Government thus dedicated to liberty and justice is based on fundamental principles, and at all times must show respect for fundamental rights. This, I take it, is what Mr. Justice Bradley meant when he said in the *Mormon Church Case* (136 U. S., 44):

> Doubtless Congress, in legislating for the Territories, would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments; but these limitations would exist rather by inference and the general spirit of the Constitution from which Congress derives all its powers, than by any express and direct application of its provisions.

And obviously it was to this that Mr. Justice Harlan,

speaking for the court, referred in *McAllister* v. *United States* (141 U. S., 188) when he said:

> How far the exercise of that power [the power to govern the Territories] is restrained by the essential principles upon which our system of government rests, and which are embodied in the Constitution, we need not stop to inquire.

Mr. Justice BROWN. Can Congress take private property for public use without compensation in the Territories?

The SOLICITOR-GENERAL. Well, I suppose the court will have to define the fundamental limitations. I do not think I can. The court has not categorically stated them as yet. The court has contented itself with saying there are fundamental principles embodied in the Constitution.

Mr. Justice BROWN. You prefer the court should define the limitations, and do not care to state them yourself? [Laughter.]

The SOLICITOR-GENERAL. I prefer to have the court define the limitations rather than try to do so myself. I think it would be presumptuous in me to act as pioneer in this matter. I am content to follow the court.

The Ann Arbor Address.

In a pamphlet entitled "An Argument in Reply," filed by Mr. Aldrich, in the Fourteen Diamond Rings case, which purports to be a report of his oral argument, there is inserted matter which we can not recollect was included in the oral argument. After asserting

that, according to the Attorney-General, Congress and the President are vested with irresponsible and arbitrary power, which has no limitations but the varying and ever-changing grace of the Congress of the United States, Mr. Aldrich turns with satisfaction to a distinguished living statesman and lawyer and quotes as follows from an address recently delivered at Ann Arbor:

"Under this absolutist construction of the powers of government in territories composed like Porto Rico and the Philippines, a law may be declared by the Supreme Court to be operative, although every section of it should supervene every bill of rights in the Constitution." And then an outline is given of what might be done by a valid law which the Supreme Court would uphold, if the position of the Government is correct, and among other sections are these:

Section 2 declares attainder against all Porto Ricans who have displayed the Spanish flag.

Section 3 declares the promotion of the native mayors of Ponce and San Juan with the titles of Lord Dukes of Porto Rico.

Section 4 provides that any Porto Rican who shall speak disrespectfully of Congress shall be guilty of treason. On conviction the offender shall have his tongue cut out.

Mr. Justice BREWER. Does anybody question the wisdom of that last provision? [Laughter.]

The SOLICITOR-GENERAL. I take it no one would question the uniformity of its operation if it were practically applied!

I might go on and read the section providing for an established church in Porto Rico. In the address the particular church to be established was not mentioned. In the revised version, printed in the North American Review, the church was named; it was his own; and since I am connected with the same church, can I be blamed for not questioning, even inferentially, the wisdom of the suggestion?

The Suggested Enactments Impossible.

What I desire to say—speaking seriously—is, that the Government has never asserted, and does not believe, that Congress has the power of a despot in Porto Rico. The fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments, referred to by Mr. Justice Bradley, stand in the way of everything suggested which shocks the moral sense. Congress could not pass any ex post facto law, or declare an attainder, or grant any title of nobility, or provide for the trial or punishment of treason in any other way than that marked out in the Constitution, all these things being prohibited by direct and applicable provisions. If the first ten amendments do not limit by direct application Congress in legislating for our new possessions—I put this as a possible case—neither do they operate within the States which compose the Union. As this court, speaking by Mr. Justice Waite, said in *United States* v. *Cruikshank* (92 U. S., 552):

> The first amendment to the Constitution prohibits Congress from abridging "the right of the

people to assemble and to petition the Government for a redress of grievances." This, like the other amendments proposed and adopted at the same time, was not intended to limit the powers of the State governments in respect to their own citizens, but to operate upon the National Government alone.

"Protection to life, liberty, and property rests primarily with the States," as Chief Justice Fuller said in *In re Kemmler* (136 U. S., 448). "The Constitution makes no provision for protecting the citizens of the different States in their religious liberties; this is left to the State constitutions and laws," said Mr. Justice Catron, speaking for the court in *Permoli* v. *First Municipality* (3 Howard, 609).

Power of the States.

The Constitution forbids the States to pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or to grant any title of nobility, and the fourteenth amendment provides that "no State shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws;" but outside the range of these limitations the people of the State, through its constitution and laws, are supreme. They can define treason against the State as they see fit; they can limit the freedom of speech and of the press; they can restrict the bearing of arms; they can provide for the quartering of troops.

Mr. Justice HARLAN. Could a State have an established religion?

The SOLICITOR-GENERAL. I have already read what the court said in regard to that in connection with the first amendment. That question came before this court in the Permoli case, and the court said that the Constitution makes no provision for protecting the citizens of the respective States in their religious liberties.

Mr. Justice HARLAN. What does the word "liberty" in the fourteenth amendment mean?

The SOLICITOR-GENERAL. That is a broad question which the court has not yet fully answered. I stand by the decision of the court upon a specific point, and if that is overruled by a general expression, I must yield.

Mr. Justice HARLAN. What would you say as to an act of Congress which absolutely forbade all trade between Porto Rico and the States? If Congress could not do that, what is the provision of the Federal Constitution that would stand in the way?

The SOLICITOR-GENERAL. I think Congress could, if it saw fit, prohibit all trade.

Mr. Justice HARLAN. And could prohibit the people in that country from coming here at all, to the States?

The "fundamental limitations" wisely elastic.

The SOLICITOR-GENERAL. I am disposed to think that goes along with the other. I will, however, discuss that phase of the question later. But let me say here, with respect to these extreme illustrations of what

might be done under a claimed power, that I understand this court has repeatedly taken the position that although a certain thing is not expressly prohibited, still if it is arbitrary and tyrannical, destructive of fundamental rights, and, therefore, opposed to fundamental principles, the court will find a way to protect the people against it. In the opinions of this court, where power in Congress has been upheld, carefully guarded language has been used, so as to leave the court free to protect the people, in case Congress should exercise such power in a way destructive of fundamental rights. Thus, in the case of *Knowlton* v. *Moore*, in which the court upheld the graded feature of the legacy tax, the following language is used (178 U. S., 109):

> The grave consequences which it is asserted must arise in the future if the right to levy a progressive tax be recognized, involves in its ultimate aspect the mere assertion that free and representative government is a failure, and that the grossest abuses of power are foreshadowed unless the courts usurp a purely legislative function. If a case should ever arise where an arbitrary and confiscatory exaction is imposed, bearing the guise of a progressive or any other form of tax, it will be time enough to consider whether the judicial power can afford a remedy by applying inherent and fundamental principles for the protection of the individual, even though there be no express authority in the Constitution to do so.

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The people of the State, through its constitution and laws, can provide for the trial of capital or otherwise infamous crimes, upon information and without indictment, and without a jury, and they have done so; and they can do away with the trial by jury in civil cases, and they have done so; and they can do many other things which I need not enumerate.

Trial by Jury in the New Possessions.

In other words, the right of the people of the States to change their laws and system of procedure so as to conform them to changed views of administration, or the developing exigencies of their social life, has been sustained. And now, I ask the question, if the Constitutional guarantees relating to indictment by a grand jury and trial by a petit jury do not tie the hands of the inhabitants of a Territory when organizing a State, why should they be held to tie the hands of the President and Congress in preserving order and protecting life and property in our new possessions?

It is a strange contention that as soon as the treaty went into effect the power of the President and Congress to preserve order in the new possessions ceased. There were no grand juries, no petit juries, no machinery for punishing crime by the processes of the Anglo-Saxon law; and yet, according to the contention of the other side, if all the limitations of the Constitution apply everywhere throughout the scope of its authority, crime could be punished in no other way. The Constitution which gave the United States power to acquire territory by treaty and imposed upon Congress the

duty of disposing of and governing it, did not leave the National Government helpless by demanding impossibilities. Until the progress of the people of the newly acquired territory will permit of the organization of courts and juries after our system, these guarantees must be held inoperative, or the preservation of peace and order, and the protection of life and property under the civil government be abandoned. The situation resembles that discussed in the case of *In re Ross* (140 U. S., 453), which I commend to opposing counsel, who contend that everywhere throughout the scope of authority of the United States under the Constitution, all limitations apply. In that case, a conviction of murder by a consular court in Japan, acting under an act of Congress, and therefore under authority of the Constitution, without a jury, and upon information, was sustained. Mr. Justice Field said, respecting these guarantees of an indictment and trial by jury in criminal cases (p. 464):

> And, besides, their enforcement abroad in numerous places, where it would be highly important to have consuls invested with judicial authority, would be impracticable from the impossibility of obtaining a competent grand or petit jury. The requirement of such a body to accuse and to try an offender would, in a majority of cases, cause an abandonment of all prosecution.

Duties collected under the Porto Rican act.

Having discussed as fully as I intend, the general question, I pass to the consideration of the Porto Rican

act. This act provides that on and after a certain date the duties imposed by the Dingley law on goods brought into the United States shall be levied and collected on all articles imported into Porto Rico from ports other than those of the United States, with three exceptions:

A duty of 5 cents a pound is levied on coffee. This is in order to protect the coffee industries there against the cheap coffee of South America.

Spanish scientific, literary, and artistic works are to be admitted free of duty for ten years. This is to carry out the provision of the treaty.

American publications are placed upon the same footing with Spanish.

Now, of course, these duties are not involved in this case, but as a temporary measure to provide revenue for Porto Rico until a system of local taxation could be framed by a provisional government—a local government created by the act—it was provided that, upon all goods coming into Porto Rico from the United States and coming into the United States from Porto Rico, a duty equivalent to 15 per cent of the duties levied by the Dingley law should be imposed. In addition, on goods brought into the United States from Porto Rico which had been manufactured in Porto Rico, the internal-revenue tax imposed by the laws of the United States on similar articles manufactured here should be imposed; and on articles manufactured in the United States and taken into Porto Rico, the internal-revenue tax which might be imposed there upon similar goods should be collected. This

internal-revenue tax is to be levied and collected by the imposition of stamps under regulations to be promulgated by the Commissioner of Internal Revenue. The revenues collected from this tax are to be applied for the use and benefit of Porto Rico. It was also provided, as I have indicated, that just as soon as the legislative assembly of Porto Rico, created by this act, should put in operation a system of taxation sufficient to meet the local needs, and the President should make proclamation of that fact, all tariff duties on goods coming into Porto Rico from the United States and coming into the United States from Porto Rico should cease. And it further provided that in no event shall any duties be collected after the 1st day of March, 1902, on merchandise and articles going into Porto Rico from the United States or coming into the United States from Porto Rico.

Reason and object of the law.

I have in my brief, on page 74 and the succeeding pages, quoted from a speech of Senator Foraker, who had charge of the bill in the Senate, in which he stated with clearness the situation in Porto Rico which led to the enactment of the measure, and epitomizes its provisions. In this he says:

> "The committee found upon investigation that a civil government should be at once established in Porto Rico, and found that this government would require for its support not less than about $3,000,000 annually. They also found that an additional million dollars would be re-

quired to support the municipal governments of the island, making an aggregate of not less than $4,000,000."

They found that the total valuation of property of all kinds situated in the island would not exceed for taxation purposes $100,000,000. They found that this property was already burdened with a private debt, evidenced by mortgages on record, to the amount of about $26,000,000 of principal, with an accumulation of several years' interest, at extravagant rates, which swelled the sum to probably $30,000,000.

The committee further found that no system of property taxation was in force in the island, or ever had been, and that it would require at least a year, and probably two years, to inaugurate one and secure returns from it, and that, inasmuch as the people had no familiarity with such a system, it would be difficult, probably, to enforce it, at least for a time.

The committee also found that the public revenues of the island, except only such as were raised by a burdensome excise tax on incomes and business vocations, had always been chiefly received from duties on imports and exports—a system with which the people were therefore familiar.

The committee further found that this system was already in operation, and that revenues were then constantly being collected, upon which, so far as they went, the Government could at once depend.

The committee further found that our internal-revenue law, if applied in that island, would

prove oppressive and ruinous to many people and interests.

To collect our heavy internal-revenue taxes—far heavier than Spain ever imposed—on these products and vocations would be to invite violations of law so innumerable as to make prosecutions impossible, and to almost certainly alienate and destroy the friendship and good will of that people for the United States.

Now, it was in view of those considerations, and in order to find some way to exempt the people of Porto Rico both from the direct taxation of their property—such taxation as is imposed in every State and organized Territory of the United States—and also from the onerous burdens of an immediate application of our internal-revenue laws, that this temporary system of taxing the exports from the island and the imports into the island was framed and put in operation. Manifestly, by the passage of the Porto Rican act, not only because of these temporary fiscal provisions, but also because of other provisions to which I call attention in my brief, Congress did not intend to recognize or treat the island as a part of the United States, but as a possession thereof, with a political existence under the sovereignty, but outside of the limits, of the United States, legislatively treated. The inhabitants are made citizens of Porto Rico, and as such entitled to the protection of the United States. A temporary civil government is provided, with a revenue system quite separate and distinct from that of the United States. The duties provided by the act, both

on goods coming into the United States from Porto Rico and coming into Porto Rico from the United States, "shall be used for the government and benefit of Porto Rico." The taxation, therefore, is of a purely local nature. It can not be said that the revenues derived from these duties were to be used "to pay the debts and provide for the common defense and welfare of the United States."

Duties laid not under the taxing, but the territorial grant.

These duties are not laid by Congress under the general grant of the taxing power contained in the first clause of section 8 of Article I, but under the power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States. The fact that the limitation in the first clause of section 8 of Article I, and indeed the provisions of that clause generally, only apply to taxes which are levied to pay the debts and provide for the common defense and general welfare of the United States, is supported by what Mr. Justice Miller says in his work on the Constitution, page 230, and what Chief Justice Marshall says, in *Gibbons* v. *Ogden* (9 Wheaton, p. 199). In that case, with reference to the taxing power, Chief Justice Marshall says:

> Congress is authorized to lay and collect taxes, etc., to pay the debts, and provide for the common defense and general welfare of the United States. This does not interfere with the power of the States to tax for the support of their own governments; nor is the exercise of that power

by the States an exercise of any portion of the power granted to the United States.

But if the contention of the other side is correct, and because the duties on exports from Porto Rico into the United States are collected in this country, although the proceeds are applied for the benefit of the Porto Rican governments, if because of the collection *here* this clause applies, and these duties must be uniform throughout the United States, then my answer is that they are uniform throughout the United States, being uniformly collected in the ports of every State into which goods may be brought from Porto Rico.

Not a duty on exports from any State.

Now, Congress has determined that this temporary local revenue measure is for the welfare of Porto Rico, and I submit that that determination is conclusive, unless there is some other limitation or prohibition which prevents. The only other provision suggested as applicable is that which provides "that no tax or duty shall be laid on articles exported from any State." The only goods which could possibly be regarded as articles exported from any State are the goods which are imported into Porto Rico from the United States. But these goods are not exports from any State. They are imports into Porto Rico. A duty laid on exports is a duty laid upon the goods at the time they are shipped abroad, and because of that fact. When goods are received at the port of destination, they cease to be exports and become imports, and a tax then laid upon

them because of their importation is not a tax upon exports, but a duty upon imports.

Whether the tax shall be considered as a tax upon exports or as a duty upon imports may depend upon the application of the revenue collected. In this case the revenue is all to be applied for the benefit of Porto Rico. The revenue collected in Porto Rico on what the other side claim are exports from the United States, is applied to the use of Porto Rico, and I say that fact is sufficient, in testing these two views, to determine that the goods are to be regarded as imports into Porto Rico.

Mr. Justice HARLAN. As far as the question of power is concerned, it would be the same, would it or not, if the duties collected upon Porto Rican products were paid into the treasury of the United States and remained here?

The SOLICITOR-GENERAL. I think it makes a material difference as to whether the revenue is to be paid to the United States or Porto Rico.

Mr. Justice HARLAN. As to the question of power?

The SOLICITOR-GENERAL. As to the authority to levy this particular duty.

Mr. Justice HARLAN. I do not say it does not. I want to get your views.

The SOLICITOR-GENERAL. I contend that this is, in a sense, a local revenue measure. It is not a case where Congress exercises the Federal power of taxation to raise revenue to pay the debts and to provide for the general welfare and the common defense, under that sec-

tion of the Constitution, but it is a measure providing local revenue for Porto Rico, under the provision which authorizes Congress to pass all needful rules and regulations for Porto Rico. And what I am inquiring now is whether there is any other provision of the Constitution, any other limitation, which prevents.

Possible Status of New Mexico.

Mr. Justice BREWER. Under that power, would it be competent for Congress to pass an act requiring a duty to be paid on all goods shipped from the other States into New Mexico, for the support of New Mexico?

The SOLICITOR-GENERAL. New Mexico might be placed, as I take it, by Congress, if Congress saw fit, in the exact position of Porto Rico. I think logically I would have to so contend. Alaska might, if circumstances demanded, be placed in the exact position of Porto Rico. I believe Congress has full power over them, subject, however, I should say, to certain provisions which protect citizens of the United States in the enjoyment of certain rights. Now, whether the vested rights and privileges which follow citizenship would prevent what you suggest, I confess I am not able at once to state. I believe that Congress could sell Alaska if it saw fit. I think that so long as territory remains under the plenary power marked out in the Constitution, it is for Congress to say whether that territory shall be taken into the Union as a State, and so indissolubly become a part of the United States, or whether the general welfare would be better subserved by parting with the territory, making, at the same time,

due provision for safeguarding all rights of citizenship, and all rights of property belonging to citizens of the United States residing there.

Mr. Justice BREWER. Does not the effect of that argument come to this, that the uniformity clause of the Constitution in respect of duties, etc., applies solely to the States?

The SOLICITOR-GENERAL. The uniformity clause does, I insist, apply solely to the States, unless Congress has seen fit to provide otherwise.

Mr. Justice BREWER. Unless Congress has extended the power?

The SOLICITOR-GENERAL. Yes, unless Congress has enlarged the boundaries of the United States—I mean within the meaning of the taxing laws.

Mr. Justice BREWER. If it enlarges, it can restrict?

The SOLICITOR-GENERAL. Certainly, unless vested rights intervene to prevent.

Naturalization.

Mr. Justice WHITE. You say Congress would have the right in your judgment to dispose of Arizona and New Mexico, provided it made provision in the treaty to protect the rights of citizenship, and so on?

The SOLICITOR-GENERAL. Yes.

Mr. Justice WHITE. But how would those rights of citizenship come into being and require protection, unless Arizona, for instance, has become a part of the United States and citizenship has resulted?

The SOLICITOR-GENERAL. Congress has entire authority over the matter of naturalization, and it may

naturalize not only by a law applying uniformly, but collectively, by special acts, and it has done so. It has naturalized Indians who lived in the Indian Territory, although the Indian Territory has not been regarded as a part of the United States in the imposition of our excise taxes. Many instances of collective naturalization might be given. And so I say, that if we have conferred citizenship, why, then, in disposing of territory that belongs to the United States, but has not become an inseparable part of the Union, doubtless the treaty-making power or Congress would provide for the safeguarding and protection of all personal and property rights flowing from citizenship in such territory.

I believe that the Government can dispose of the Philippines if it deems best to do so. The power that can acquire, can sell or exchange. I do not occupy the position from which the other side can not escape, that the cession made the Philippines an integral part of the United States, inseparably incorporated under the Constitution, and with rights unalterably fixed by the Constitution. I believe they are but a possession—territory belonging to the United States—which we can part with whenever it becomes apparent that their interests or our welfare demands a separation.

Porto Rico not now a foreign country.

It may be further suggested that within the decision of *Woodruff* v. *Parham* (8 Wallace, 123) the goods shipped into Porto Rico from the United States are not exports from the States, because not shipped to a for-

eign country. The commerce, I take it, between Porto Rico and the United States since the passage of the Porto Rican act is not foreign commerce, but domestic commerce. It is commerce passing between countries under the sovereignty of the United States, commerce which is regulated by Congress, possibly under the power to regulate commerce either among the several States or with foreign nations—I say possibly, having in mind the opinion in the case of *Stoutenburgh* v. *Hennick* (129 U. S., 141), in which the court held that the action of the local authorities of the District of Columbia in taxing a commercial traveler was in violation of the commerce clause—or under the power, as I have said, to make all needful rules and regulations respecting the territory or other property belonging to the United States.

Power to regulate commerce.

I submit that the authority to regulate these insular possessions includes authority to regulate their commerce, both with foreign countries and with the United States. Commerce is always a rightful subject of regulation by a governing body. It is true that the Constitution places certain limitations upon the power of Congress to regulate the commerce of the States. While Congress is given express power to regulate commerce with the foreign nations, and among the several States and with the Indian tribes, it is provided that no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another. But obviously this Porto Rican act

gives no preference to the ports of one State over those of another. All States are treated alike. Goods going into Porto Rico pay a certain duty there, no matter from what State or port shipped; and goods coming into the United States from Porto Rico pay a certain duty here, no matter to what port or State shipped. It is true that the Constitution declares that the citizens of each State are entitled to all the privileges and immunities of citizens of the several States. That is what I referred to a moment ago in answering the question of Mr. Justice Brewer with reference to Arizona; but I fail to see in what way the rights of a citizen of any State can be infringed by the Porto Rican act. All citizens are treated alike.

Mr. Justice HARLAN. Suppose they are not treated alike. Suppose this act had given a preference to the commerce coming to this country to the ports of one State over the ports of another. Under your view, what clause of the Constitution would forbid Congress from doing that?

The SOLICITOR-GENERAL. The very clause I have read.

Mr. Justice HARLAN. You call that a regulation of commerce, do you?

The SOLICITOR-GENERAL. I do, most emphatically. But the clause applies also to any "regulation of revenue." Moreover, no privilege or immunity granted to the people of Porto Rico by the treaty of Paris is infringed by this legislation, for the treaty itself expressly provided that their civil rights and political

status should be determined by Congress; and Congress has declined to make them citizens of the United States, restricting their status to citizens of Porto Rico, entitled to the protection of the United States. As such, Congress has framed a measure peculiarly adapted to raise the insular revenues in the easiest way, thus avoiding the imposition upon them of burdens which would become intolerable if our internal-revenue taxes were extended to them.

States may tax imports or exports with consent of Congress.

Before the adoption of the Constitution—and I will now direct myself, possibly, to something that is in the mind of Mr. Justice Harlan—the States had severally the power to lay duties and imposts on imports and exports, and they exercised it. The Constitution forbade the further exercise of this power without the consent of Congress and unless the net proceeds of all duties and imposts so laid should be applied for the use of the Treasury of the United States, the clause reading as follows:

> No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts laid by any State on imports or exports shall be for the use of the Treasury of the United States; and all such laws shall be subject to the revision and control of the Congress.

Now, this seeming prohibition—I should not say seeming—this prohibition, is equivalent to an implied

grant of authority to a State, or a recognition of authority existing in a State, to lay imposts or duties on imports or exports, providing Congress shall consent, and upon the condition that the net produce of such duties shall be for the use of the Treasury of the United States. And it is a recognition of the fact that the needs of both a State and of the United States might be promoted by special duties on the imports or exports of a State. The condition thus recognized and provided for in the case of a State has, in this particular instance, been legislated for by Congress, which possesses both State and Federal jurisdiction in the case of Porto Rico. I might say in this connection, respecting the levying of duties by a State on imports with the consent of Congress, that the same limitation and grant applies in the case of tonnage duties, and that the legislative history of the country shows that Congress has given its consent to a great many measures where a State levied duties, either on tonnage or on imports. With reference to tonnage duties, Chief Justice Marshall said (9 Wheaton, p. 202): "A duty on tonnage is as much a tax, as a duty on imports or exports; and the reason which induced the prohibition of those taxes extends to this also. This tax may be imposed by a State, with the consent of Congress."

I have here a list of thirty acts, passed from 1790 to 1847, in which the assent of Congress was given to the acts of States levying duties on imports or tonnage for harbor improvements or other local purposes.

The policy of the uniformity clause does not apply to Territories.

It may be insisted that the constitutional provision which requires all duties, imposts, and excises to be uniform throughout the United States lays down a fundamental rule of taxation applicable everywhere; that no special mode of taxation, to meet the needs of a particular territory, can be framed by Congress, but that all duties and excises must be laid uniformly throughout all the territory over which the sovereignty of the United States extends. With respect to this, I beg to say that there was a good reason for requiring duties and excises to be uniform throughout the States of the Union, and that reason is stated clearly in the opinion of the court in *Knowlton* v. *Moore*. But there is neither reason nor justice in requiring the same taxes to be imposed wherever the flag flies. The collection of our internal-revenue taxes is impossible and impracticable in Porto Rico and the Philippines. They were framed to meet conditions here; they would be ruinous there. We are not engaged at present in collecting taxes in Porto Rico for the benefit of the United States. The only taxes collected are used for the benefit of Porto Rico. Of course Porto Rico receives the benefit of the general revenues to a certain degree, for the General Government is there with its agencies supported at the general expense, and it would be only fair, if Porto Rico could stand it, to make her bear her fair share of the national burdens in return for the benefits she receives. But, after all, the entire

matter is left with Congress, and the uniform imposition in Porto Rico of the national system of taxation would not relieve the island from the necessity of responding to further exactions, should Congress deem them necessary in order to meet the local expenses of the government of the island. Congress possesses over Porto Rico, to use the language of Mr. Justice Gray in *Shively* v. *Bowlby*, "the entire dominion and sovereignty, national and municipal, Federal and State." What good purpose could be served, then, by attempting to apply in Porto Rico the provision that Federal taxes shall be uniform throughout the States. It is all right to require Federal taxes to be uniform throughout the States. This secures a uniform contribution from the States for a uniform benefit. Only the national taxes are raised in the States by the Federal authority. The States raise their own State, county, and municipal taxes. They regulate these to suit themselves. Congress has no say about them. But in Porto Rico Congress has power to raise not merely national but all insular revenues, everything needed to carry on the local government. It is not necessary, as I understand it, that in raising taxes for a Territory Congress should distinguish between the purposes to which the taxes are to be applied and levy specific taxes for national purposes and other taxes for other purposes. Especially is this true before a territorial government has been organized and has established and put in operation a system of local taxation. Congress may and must necessarily combine the sources of revenue and

apply the proceeds as the circumstances require. The power and the necessity of doing this prevents any just comparison between the revenue system established by Congress in a Territory and that in force for purely Federal purposes in the States.

Respecting the territorial governments, with their courts and laws, Mr. Justice Nelson, speaking for the court, said in *Benner* v. *Porter* (9 How., 242):

> They are legislative governments, and their courts legislative courts, Congress, in the exercise of its powers in the organization and government of the Territories, combining the powers of both the Federal and State authorities. There is but one system of government, or of laws operating within their limits, as neither is subject to the constitutional provisions in respect to State and Federal jurisdiction.

With regard to the matter of taxation in Porto Rico, it is quite pertinent to put the question which Mr. Justice Harlan, speaking for the court, put in the case of *McAllister* v. *United States* (141 U. S., 190), respecting the power of Congress over the courts of a Territory:

> Has Congress, under "the general right of sovereignty" existing in the Government of the United States as to all matters committed to its exclusive control, including the making of needful rules and regulations respecting the Territories of the United States, any less power over the judges of the Territories than a State, if unrestricted by its own organic law, might exercise over judges of its own creation?

In other words, to paraphrase this, has Congress, under "the general right of sovereignty" existing in the Government of the United States as to all matters committed to its exclusive control, including the making of needful rules and regulations respecting the Territories of the United States, any less power in raising territorial revenue than a State, if unrestrained by its own organic law, might exercise in raising revenue within its borders?

The Ordinance of 1787.

In the argument of counsel on the other side, reference was made to the Ordinance of 1787, as showing that the term "the United States" includes the territory belonging to the United States. Counsel called attention to the fact that in the treaty between this country and Great Britain the description of the United States included the vast expanse outside of the limits of the thirteen Colonies, but claimed by them as the successors of the royal power, stretching into the great West, and insisted that that constituted the United States. I think a careful reading of the Ordinance of 1787 and the history of the release by the Colonies, which composed the United States under the Confederation, of their claims to the territory covered by the Ordinance of 1787 shows conclusively that a distinction was drawn between the United States under the Confederation and the territory belonging to them which lay northwest of the Ohio. The ordinance itself says that it is an ordinance "for the government of the territory of the United States north-

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west of the Ohio River." This territory had been ceded by certain of the Colonies—Virginia, New York, and others—who claimed it, to the United States, because the Colonies properly claimed that unless they succeeded in the war with Great Britain the title would amount to nothing. It was being won by the blood and treasure of all, and therefore should belong to all, and the Colonies conceded this to be a fact, and therefore turned over their title and claim to the United States. And then this ordinance for the government of the territory was passed, and it says it is an ordinance for the government of the territory of the United States northwest of the Ohio River.

With respect to members of the general assembly it provides that no person shall be eligible unless he shall have been "a citizen of one of the United States three years." Did that mean a citizen of the Northwest Territory? Evidently not, because it goes on to provide, "and be a resident in the district, or unless he shall have resided in the district three years." In other words, a citizen of one of the United States was eligible if he resided in the district, while a person not a citizen of one of the United States must have resided in the district three years to be eligible.

"For extending the fundamental principles of civil and religious liberty, which form the basis whereon these republics, their laws and constitutions, are erected," it was provided and declared that certain articles should be considered "as articles of compact" between the original States (that is, the United States under the

Confederation) "and the people and States in the said territory, and forever remain unalterable, unless by common consent." Here is a distinct recognition that the Northwest Territory was not a part of the United States. The Ordinance forms a compact between the United States under the Confederation and the people and States to be formed in the Northwest Territory.

In the fourth article it is provided that the navigable waters leading into the Mississippi and St. Lawrence, etc., shall be common highways, and forever free, "as well to the inhabitants of the said Territory as to the citizens of the United States, and those of any other States that may be admitted into the Confederacy."

Conclusion.

As I have sat and listened to these elaborate arguments, whereby counsel, ignoring the plain and simple provisions of the Constitution, seek, by a refinement of reasoning, to induce this court to take away from the President and Congress the power to govern newly acquired territory according to its nature and needs—a power which has been exercised, from the days of the founders of the Republic, by the nation which then, to use the words of the Declaration, assumed "among the powers of the earth, the separate and *equal* station to which the laws of nature and of nature's God entitled it," I can not but recall the impressive language of the great Chief Justice Marshall, at the close of the remarkable opinion which he delivered in the case of *Gibbons* v. *Ogden:*

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> Powerful and ingenious minds, taking, as postulates, that the powers expressly granted to the Government of the Union, are to be contracted by construction, into the narrowest possible compass, * * * may, by a course of well-digested but refined and metaphysical reasoning, founded on these premises, explain away the Constitution of our country, and leave it, a magnificent structure, indeed, to look at, but totally unfit for use. They may so entangle and perplex the understanding, as to obscure principles, which were before thought quite plain, and induce doubts where, if the mind were to pursue its own course, none would be perceived.

We have the new territories. We are responsible for them, responsible to their people, to ourselves, to the world. We must provide them a government. May we not give them a government adapted to their needs? May we not in governing them carry out the solemn stipulations of the treaty through which we acquired sovereignty over them? The path of duty is plain. May we not walk in it? Does the Constitution prevent? Is the Constitution a stumbling block, or a trap, caught in which we shall excite the pity of our friends and the derision of our foes? I refuse to believe so. The Constitution is no mere declaration of denials. It created a nation to which was intrusted the full power asserted in the Declaration of Independence—"to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which independent States may of right do." When it

conferred power, it took care not to cripple action. It still remains the most perfect instrument ever struck off at a given time by the brain and purpose of man, under which we are armed for every emergency, and able to cope with every condition.

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